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Christian Human Rights: An Introduction*

Sam Moyn

Christmas Day, 1942. The outcome of World War II was undecided. A month before, the tide at Stalingrad had turned against the Germans; just two days before, General Erich von Manstein had abandoned his efforts to relieve the Wehrmacht's doomed Sixth Army. Still, there was no telling that the extraordinary German strength in the war on display so far would now ebb quickly. Nonetheless, the Roman Catholic pope, Pius XII, had something new to say.

The Americans had formally entered the war a year before, but the Allies would not reach mainland Italy for another nine months, or make it to Rome for a year and a half. The pope felt himself in dire straits. His relationship with Benito Mussolini had long since soured, and he was a prisoner in his own tiny Roman domain. As for the Jews, the worst victims of the conflict, millions were dead already; the victims at Babi Yar had lain in their ravine for more than a year; Treblinka, the most infernal death camp, had begun killing operations six months before and much of its grim work was already complete.

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* This event was organized and sponsored by the YTL Centre of Politics, Philosophy and Law.

Electronic copy available at: https://ssrn.com/abstract=2969703

Officially, of course, the papacy and its leader were neutral in the war, and did not play politics. Many of Pius's flock, however, were to be found on all sides of the war. To the extent recent observers have revisited Pius's Christmas message, it has been to argue about whether he could or should have said more about the Holocaust than he did. But the real interest in the message is what the pontiff was for, not what he was against. In this fight, Christianity stood for values, and in the perspective of world history, Pius XII had some new ones.

On that day, the appeal to reaffirm faith in the dignity of the human person, and in the rights that follow from that dignity, reached unprecedented heights of public visibility. The very first of the five peace points that Pius XII offered that day ran as follows:

> *Dignity of the Human Person*. He who would have the Star of Peace shine out and stand over society should cooperate, for his part, in giving back to the human person the dignity given to it by God from the very beginning… *He should uphold respect for and the practical realization of ... fundamental personal rights*… The cure of this situation becomes feasible when we awaken again the consciousness of a juridical order resting on the supreme dominion of God, and safeguarded from all human whims; a consciousness of an order which stretches forth its arm, in protection or punishment, over *the unforgettable rights of man* and protects them against the attacks of every human power.[1]

It was a critical turning point, one that defines history since, if not exactly in ways that Pius XII intended.

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[1] Pius XII, Christmas Message, December 25, 1942.

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People now treat such affirmations, and especially the notion that human dignity provides the foundation for universal human rights, as a set of conventional and enduring truths. Yet it was all rather new at the time. The Roman Catholic Church had previously rejected the hitherto secular and liberal language of human rights. But now the pope turned to it, making human dignity its new basis. Around the same time, ecumenical formations of transatlantic Protestant elites proclaimed human rights to be the key to future world order. The communion between human rights and Christianity was therefore a novel and fateful departure in the history of political discourse.

Undoubtedly, the pope's first peace point was the supreme, influential, and most publicly prominent invocation of human dignity during World War II proper and likely in the whole history of political claim-making to that date. It gave Christian "personalism" a broad hearing, attaching supreme ethical significance to human beings agonizingly caught between individualist atomism without community and "totalitarian" statehood without freedom. Alongside novel Protestant discussion, it was also at or near the top of the list of prominent wartime invocations of the basic idea of universal human rights, especially when understood as a framework – as Pius XII would express it very clearly two years later in his 1944 Christmas message – of world and not merely state order. But what did such conceptions mean as they made their way into, and did much to define, democratic and international ideals after the war?

The history of human rights in the 1940s was hardly just a matter of Christians merely adopting longstanding rhetoric or even commitments, in spite of the long prior history of rights in various forms and settings. Amplifying the importance of human rights before a vast public, Pius's statement also recrafted the meaning of the principles it

merely claimed to recall to importance. It made what had been secular and liberal into a set of values that were now religious and conservative. And it provided an inkling of how Christians would come to defend the postwar democracies they later founded in Western Europe, which were religious and conservative in nature.

The ideological association of Christianity and human rights depended on contingent and timebound circumstance no later than the 1940s and shortly before. Far from teaching us simply about the Christian invention of human rights in the 1940s, interesting and important as that development was, the history of this crystallizing moment casts light on the fortunes of the concept as a whole. Not the least of the reasons is that it turns out to be quite difficult to find non-Christians who enthused about human rights, and more especially their basis in human dignity, in the age. The history of Christian human rights in the 1940s is the major part of the history of human rights generally at the time, before the principles became the slogan of a mass movements and a central element of contemporary international law.

Mainstream secular observers are generally unaware of — for their secular historians have nervously bypassed — the Christian incarnation of human rights, which interferes with their preferred understandings of today's highest principles. Meanwhile, those interested in Christian sources, overwhelmingly Christians themselves, are prone to misinterpret them. The proposition that human rights arose with profound connections to Christian contexts is normally defended, in both public discourse and scholarly arguments, in a highly abstract way and about long ago events. It was from "the biblical conception of man," Pope John Paul II noted in 2003, that "Europe drew the best of its humanistic culture, and, not least, advanced the dignity of the person as the subject of

inalienable rights."[2] Preference for classic sources that supposedly cast the die for Christianity's advocacy of human rights across the millennia is especially evident among certain Christians who most want to take credit for what have become the premier values of the day, precisely in view of their contemporary prestige. According to such views, it is rather old Christian lineages – stretching from the Annunciation to the Reformation – that help explain the existence, shape, and prestige of the idea of human rights today.

Looking back that far is not a mere distraction. No one could plausibly claim – and no one ever has – that the history of human rights is one of wholly discontinuous novelty, whether in the 1940s or after. But radical departures nonetheless occurred very late in Christian history, even if they were unfailingly represented as consistent with what came before: this is how "the invention of tradition" most frequently works. Christian human rights were injected into tradition by pretending they had always been there, and on the basis of minor antecedents now treated as fonts of enduring commitments. Novelty always comes about not *ex nihilo* but from a fragmentary past that is coaxed into more robust form. Even partial continuity across time often proceeds through rediscovery and reactivation of lost possibilities and underemphasized realities. Many of those who want the ideological association of Christianity and human rights to be deep and lasting are participants in such inventions rather than analysts of them, for they play down or pass over the fact that Christianity had mostly stood for values inimical to those we now associate with human rights. It took a set of wrenching experiences for Christianity to come to seem favorable to them.

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[2] John Paul II, Ecclesia in Europa, June 28, 2003.

The truth is that Europe and therefore the modern world drew nearly everything from Christianity in the long term. It would be fictitious to retrospectively edit the long and tumultuous history of Europe, as if everything we liked about the outcomes were due to its hegemonic religion, while the rest was an unfortunate accident or someone else's fault. And to the extent this is true, the challenge of isolating the crucial period for a strong ideological link of Christianity with human rights changes. It means looking not so much at Jesus (or even at the Reformation), but at novel mid-twentieth century interpretations of what his teachings demand, to understand how the huge set of possibilities the Christian legacy bequeathed was winnowed down.

The trouble, after all, is not so much that Christianity accounts for nothing, as that it accounts for everything. Without Christianity, our commitment to the moral equality of human beings is unlikely to have come about, but by itself this had no bearing on most forms of political equality – whether between Christians and Jews, whites and blacks, civilized and savage, or men and women. That had been true for millennia, and it was mostly still true on Christmas Day, 1942. If the winnowing of Christian values was not complete (and never is, since traditions are never set), it was above all because the war was undecided. Pius's peace points are fascinating because they introduce human dignity and rights before the war's outcome was clear.

It was not just that over its long trajectory, Christianity had stood for the star of peace, but also the dogs of war, when their violence was thought to serve justice; that its members had powered abolitionism in the nineteenth century, but also that slavery's defenders relied upon Christianity's long tolerance and support for the institution; that Christians stood for the spiritual kingdom, but also had served worldly empires, from

Rome to modern global ones; and that, whatever the fervency of their commitment to the equality of souls, patriarchy in so many forms was perhaps their fundamental commitment. Most relevant to our purposes, Christians and Christian thought were deeply entangled in the collapse of liberal democracy on the European continent between the wars. Catholicism in particular had celebrated victories for its social teachings in the fall of liberal democracy in authoritarian Austria, Spain, and Portugal in the 1930s, and Vichy France during the war, even as a Catholic priest was the titular head of Nazi Germany's most subservient client state, Slovakia. Christians even had truck with fascism. From the pinnacle of the churches to the rank and file, only a few Christians denounced it in these years, and normally then in the name of strictly Christian ideals and interests; more acquiesced to fascism, or fervently served it, including in Nazi Germany, what some were calling "the holy reich."

And yet it is also Christians who did much and perhaps most to welcome and define the idea human rights in the 1940s, and some of its core notions such as the importance of human dignity, which nobody else was yet making central in 1942. How was this possible? Perhaps it was because, to a rather disturbing extent, human rights and especially human dignity had no necessary correlation with liberal democracy. Certainly not in 1942, when Christian leaders such as the pope were not yet (to the extent he ever became) friendly towards that regime. It would be tempting to argue that its flirtation with far-right politics and the horror of totalitarianism summoned Christianity back to its true essence, but this argument only works so long as it is recalled that the fundamental truths its partisans wanted most to honor were morally constraining, and that human rights entered the equation as a belated discovery about how to achieve enduring ends.

And so when liberal democracy later came in Western Europe, it was in a conservative and religious form graced by a commitment to human dignity that signaled enormous continuity with the past, not simply learning from mistakes.

Almost unfailingly, the annunciation of human rights in the 1940s is now viewed by the general public and professional scholars as the uncomplicated triumph of liberal democracy. But the general thesis of my new book, *Christian Human Rights*, is that through this lost and misremembered transwar era, it is equally if not more viable to regard human rights as a project of the Christian right, not the secular left. Their creation brought about a break with the revolutionary tradition and its *droits de l'homme*, or – better put – a successful capture of that language by forces reformulating their conservatism.

For this reason, the central question about Christian human rights in the 1940s is whether the Christian and conservative encounter with human rights – the embrace of liberal principle by forces once inimical to it – is plausibly seen as a victory for liberalism. Conservatism, to be sure, was updated through affiliation with historically liberal norms and a historically liberal language. Authoritarian solutions to crisis were taken off the table – with the very large exception of the Iberian peninsula, where they survived for several more decades. But in reviewing this process it behooves one to ask whether Christianity and conservatism were able to change liberalism more than they were changed by it. In this period, perhaps the most durable and fateful transformation was the start of a new era in liberalism – specifically, the ideological origins of religiously-inflected Cold War liberalism in the face of the specter of "totalitarianism." It was a new liberalism that substantially overlapped with conservatism, suitably corrected, after the

purgation of the extreme right and for the sake of standing down the left, extreme and not so extreme. In many respects, that conservative vision of liberalism remains alive and well.

This dramatic story must therefore focus most of all on the extent to which, across the 1930s and 1940s, the language of rights was extricated from the legacy of the French Revolution, the secularist mantle which the Soviet leaders were now widely seen to have assumed. And thanks to their championship within a new political formation – constitutionally organized religious democracy governed by Christian parties – a compromise between Christianity and democracy became not only palatable, but a precious resource for the future of religious values. It is this story that *Christian Human Rights* tries to tell. It looks first at the invention of constitutional dignity, before World War II, then the invocation of the "human person" before, during, and after — including in some of the first statements of human rights in connection with international organization. Finally, the book concludes by examining the problem of legacies, claiming that one contributing reason for the regional European Court of Human Rights decisions to allow states to interfere with Muslim religious practice is that some of the doctrines that once made human rights a tool to stigmatize communists have now been redeployed against a new perceived threat.

Samuel Moyn – *Christian Human Rights*

Thomas Pink

1. Samuel Moyn's thesis

According to Samuel Moyn's *Christian Human Rights*, it is in the middle of the twentieth century that human rights become important in public politics and international law. But they enter the public world as conservative or Christian human rights, principally through Catholicism. Authoritarian regimes have become discredited as a Catholic political form. The way forward is to espouse democracy, but within a morally conservative framework. Recognition is given to the rights, liberty and dignity of the individual, but so understood as to oppose secularism – and especially to oppose Communism.

These individual rights are understood in personalist terms, as based on human dignity. They are rights to liberty and especially rights to religious liberty. But the person is understood as spiritual and directed at spiritual ends, and liberty is understood in terms of natural law – as subject to the moral constraints of a divine order, not as directed at human emancipation or autonomy or preference satisfaction.

This Catholic personalism is increasingly taken up by the official Church, and eventually involves ecumenical cooperation with Protestantism. This is a process that begins under Pius XI and Pius XII and is completed in *Dignitatis Humanae*, the declaration of an individual moral right to religious liberty by the Second Vatican Council.

This espousal of human rights as rights of individuals, Moyn claims, is not really faithful to earlier Christian tradition, which especially as Thomism or in earlier intellectual forms

was never friendly to human rights, as neither were the nineteenth century popes. It is a hijacking or an exploitation for conservative ends of elements that come from outside the older Christian tradition.

> But radical departures nonetheless occurred very late in Christian history, even if they were unfailingly represented as consistent with what came before: this is how the invention of tradition most frequently works. Christian human rights were injected into tradition by pretending they had always been there, and on the basis of minor antecedents now treated as fonts of enduring commitments. *Christian Human Rights*, p5

2. A critique in outline

The mid-twentieth century Catholic emphasizing of individual rights, eventually to include a very explicit declaration of a right to religious liberty, was certainly new. But it was not an injection into tradition of something alien. Rather it arose out of a distinctively Catholic and very traditional model of the relation of liberty and law. This model is crucially indeterminate in its concrete implications for personal liberty. In matters of religion especially, the model can both support coercion and oppose it.

This model was central to the political theology of Leo XIII (pope 1878-1903) which from the 1880s to Vatican II provided an official framework for understanding religious liberty within the Church. We can therefore term this model of law and liberty the Leonine model. But the model was very old. The model was central to the counter-reformation Jesuit political theology of Bellarmine and Suarez, which Leo XIII revived. Already at the counter-reformation the model taught the existence of individual rights, including rights to liberty. And this understanding of the rights of the individual in turn had its roots in the Church's canon law tradition, which even before the rise of a language

of personal rights treated aspects of the human person as constituting a normative block to the coercion of the individual in their religious belief and practice.

The mid-twentieth century saw a new development of the Leonine model, especially through the work of Jacques Maritain. The model was now used to assert the religious liberty of the individual rather than the legitimacy of religious coercion. But the right to religious liberty asserted was a Leonine right. It was quite different from any right to religious liberty found in secular political theory.

This change was more theologically driven than Moyn allows for. It was not simple political opportunism, but also reflected a profound shift in general theology away from a previous dominance of Augustine and Augustinianism – a dominance that had been reconfirmed at Trent, and that still marked the teaching of Leo XIII and other nineteenth century popes. This means that the Catholic espousal of individual rights was also much less conservative than Moyn allows for. Moyn's association of official Christianity with the conservative can be dangerous. Moyn mentions the Christian realism espoused by such a figure as the Protestant jurist Gerhard Ritter. Christian realism takes a pessimistic view of the fallen human condition: morality alone will not reverse evil, and coercion may be needed (p104). The Catholic retreat from Augustinianism involved the reverse of Ritter's Christian realism. The nineteenth century popes had defended the Leonine model while taking a bleak view of the fallen world: because of the Fall power needed to be disciplined not only morally but through the state giving coercive protection and privilege to religious truth. By contrast, *Dignitatis Humanae* with its defence of individual liberty was a restatement of the Leonine model for a benign view of the world as by now much more reliably oriented towards the good. This move away from Augustinianism was not a narrowly political development. It was reflected in areas of Catholic life that lay far from political theology. For example, it was central to the radical liturgical reforms that followed Vatican II, which saw the extensive suppression of ancient prayers (such as the old collects for Lent) that had emphasized fallen human weakness and vulnerability to evil.

3. The Leonine model

Central to the Leonine model is our standing as humans as bearing the image of God – and much of the talk about human dignity is really a packaging of this conception in less overtly religious terms. We bear the image of God as possessing the capacity both for reason and for freedom as a power to determine for ourselves what we decide and do – a power of free will or control that is multi-way, making alternatives available to us.

This power has a function – to take us to the good, and so make alternative goods available to us. But we can misuse this power, and as fallen beings we frequently do misuse it, to go for options that are bad.

This power of freedom, with its function of making alternative goods available to us, has important normative implications. First it gives us as individuals a right not to be coerced – a right not to be subjected to direction backed by threats of sanction – unless by a legitimate authority. For coercion, with its threat of sanction, is all about removing or lessening the good involved in options other than that to which the coercer is directing us. Coercion is thus in tension with a power whose very function is to provide us with alternative goods. That is why coercion always stands in need of justification.

Now our fallen condition does indeed leave room for some coercion to be justified. The power of freedom as exercised by fallen humans requires direction by sanction-backed law, to deter bad use of freedom that would harm the community. Not only is direction by sanction-backed law needed to direct the use of freedom by fallen humans, but the same power of freedom also makes the law's threat of sanction fully legitimate when understood as punishment. For the power of freedom makes us morally responsible for

any breach by us of the law. Given our freedom and the moral responsibility it bases, the sanctions that meet such a breach can be genuinely deserved as fair punishment.

So free will is both a normative block on coercion and a normative enabler of it. Free will blocks coercion by private individuals or by institutions that lack proper authority. But once the coercion is being imposed with proper authority, free will then legitimizes that coercion and helps justify it.

This conception of human free will as both normatively blocking coercion and normatively enabling it long predated the language of individual rights. Take the fourth council of Toledo in the seventh century, so important within the subsequent canonical tradition. Free will or *liberum arbitrium* protects unbaptized Jews from being subject to coercive pressure into baptism by the Church, this council teaches; but once people are baptized, they are subject to the law and jurisdiction of the Church, and the faith can be punitively imposed upon them. Once people are baptized, the Church stands to them as a legitimate authority competent to impose religious obligations. But without baptism people fall outside the Church's jurisdiction, and their free will blocks the coercion.

Central to the Leonine model is the question of legitimate authority. What authorities have the right to coerce and in what areas of life?

Dignitatis Humanae is a highly peculiar document by secular standards. Moyn mentions a Rawlsian model of religious liberty: the state and political life occupy a public realm from which religion is protected as long as it remains private. The state and political life transcend religion. In *Dignitatis Humanae,* by contrast, we have a quite opposite understanding. Religion is properly part of the public life of any political community – but it transcends the state and state authority.

So our right to religious liberty is very unlike another highly important right – the right to liberty of movement, the right (within limits) not to be subject to coercion in respect of where we go. Though that right is fundamental to human liberty, the good of movement hardly transcends state authority. The state can regulate movement, through transport and traffic rules, for the general good, including for the sake of movement itself. But the Catholic view of religious liberty is quite different. Religion, as involving the worship rightly given to God alone, is a good entirely transcending state authority. The state lacks any authority of its own to coerce on grounds specific to religion, such as restricting religions on grounds of their supposed falsehood, or legally privileging a religion on grounds of its supposed truth.

Why does religion entirely transcend state authority? Only because of a distinctively religious view of religion. In the Leonine model religion does not transcend coercive authority as such. Coercion to protect and privilege religious truth may be justified. Instead the coming of Christ has raised religion and the religious good to a supernatural end, the beatific vision of heaven, that transcends the capacity of human nature, and where the state has no competence. In Jesuit and ultramontane Leonine political theology Christ is a religious liberator; in particular he liberates religion from the authority of the state. Religion is removed by Christ from the authority of the state that serves natural goods such as movement through space, but is then handed over to the Church, a new and specifically religious coercive authority with the sole right to legislate and punish in matters of religion.

So it is a constant feature of the Leonine model to teach an individual right to religious liberty – against the authority of the *state*. It is the state that lacks the authority to legislate and punish in matters of religion. And it is a right to religious liberty against the state that is taught in *Dignitatis Humanae*.

Moyn's question was why in the mid-twentieth century the popes suddenly began to

emphasize rights to liberty against the state, especially in matters of religion. But in fact we should ask why, given this Leonine framework, they were not doing so long before. Why was the right to liberty of religion against state authority, a right that is built into the Leonine model, so long unexpressed?

That was because of the final element to the Leonine model – the relation of Church and state. The Church can address the state in two very different ways. The Church can address the state as an independent civil *potestas* – an independent player when it comes to exercising coercive authority. And that is what, when facing the Nazi and Communist regimes that might threaten religion, it was indeed very natural for the Church to do. But the Church can also address the state as she had earlier done - as still hopefully, in the Church's own aspiration, a Christian state united to the Church in a single Christian community. Here, according to Leonine teaching, Church and state were to be united as soul and body are united in a single person: the state would act as agent for the Church in religious matters as the body acts at the behest of the soul in intellectual matters.

Where we have a soul-body union of Church and state, the state does make laws in matters of religion and enforce them. But in so doing the state is not acting on its own authority in a normative order that is civil and based wholly on natural law. Rather the state is acting in a normative order that is specifically religious, and as an agent for the religious authority of the Church.

And that is how the nineteenth century popes still wanted to address the state, most explicitly in the case of Leo XIII himself – in *Immortale Dei* of 1885 - and in the official manual theology which that encyclical, especially, gave rise to. In the context of a soul-body union, our rights to religious liberty may be rather restricted. Since the state is acting as the Church's agent, our religious rights will only be those we have against the Church as defender of the religious good. Much more important will be the significantly restrictive duties in relation to religion that can be politically imposed on us, again under

the authority of the Church. We can be forbidden to practise false religions publicly, or to evangelize publicly on their behalf.

4. Dignitatis Humanae

Maritain was faithful to the general Leonine model. So too, at Vatican II, was Paul VI, himself a Maritainian. This is why, acting on Paul VI's instructions, the commission that drew up *Dignitatis Humanae* worked within the Leonine model. The Leonine model was repeatedly reaffirmed in the official communications – the *relationes* – by which the commission explained the draft declaration to the council fathers. These *relationes* reassert the Leonine division between two levels of coercive legal authority: the religious order served by the Church as one coercive *potestas* and the civil order served by the state as another. What *Dignitatis Humanae* crucially does is to assume a detachment of the state from any agency relationship with the Church. But of course, in the context of such a detachment, a right to religious liberty against the state follows immediately from the Leonine model as traditionally conceived. This right is no invention of tradition, but an expression of it.

Dignitatis Humanae also clearly assumes (though this is not explicitly taught) that this detachment of state from Church is an advance. This is indeed quite a change. By contrast Leo XIII regarded Church-state separation as an evil that might have to be tolerated, but which should be resisted where possible. This change is obviously crucial. It ensures that the Church no longer even aspires to a soul-body union of Church and state. What explains this change?

Moyn's thesis might suggest simple opportunism. Church-state union was being abandoned after the second world war only because it was now a politically unrealistic way of fighting secularism. But that cannot be the whole story. In Italy in 1885, given the

hostile regime of the new united Italian monarchy, a union of Church and state was less realistic than it was under the much friendlier regime of the new post-1946 Italian republic. But in 1885 Leo XIII still chose to espouse soul-body union as the ideal. And in 1965, from a position of greater political advantage at its centre, the Church was choosing to abandon that ideal.

Communism was of course a factor. There was a need for international support for local Catholic churches oppressed by hostile Communist regimes, support that would be alienated by any continued demand that states privilege Catholicism. But the change would not have been possible without a new view of the Fall and its consequences. The nineteenth century popes had taught that the state needed Church-state union to function properly as a state. Detached from the Church, in a fallen world the state would become corrupted and would cease to defend and apply the natural law. It would violate natural justice in relation to marriage and the rights of the vulnerable. The state would even cease to recognize religion itself as a genuine good.

But Maritain and his disciples thought that Church-state separation would not have this consequence. Thanks to the influence of the Gospel, the state no longer needed to be united to the Church to function as it should. Church state-union conceived in Leonine terms was legitimate and necessary for the more primitive 'sacral period' of the middle ages. But in the more spiritually advanced 'secular age' of the present the state could become religiously neutral, and still be relied upon to respect natural law. This detachment of state from Church was not an obstacle to the progress of the Gospel, but a sign and expression of it.

And that is how you get *Dignitatis Humanae* – as a reworking of the Leonine model for the 'secular age'. The declaration in no way challenges the traditional theory of the Church as a coercive *potestas* in the field of religion. It simply defends the old Leonine and specifically Christian view of the right to religious liberty – as reflecting Christ's

liberation of religion from state authority. The novelty is not the much-discussed personalist emphasis on human dignity and its rights – in itself that view of human moral status was nothing new in Catholicism – but a Whig theology of secularization as spiritually progressive. The bad consequences of the Fall are being ameliorated through the influence of the Gospel, but in a way that operates through secularization and not against it, as with a growing human spiritual maturity the state is released from an archaic 'sacral' dependence on the Church.

The nineteenth century popes had no time for any such Whig theory of human spiritual progress. It is an interesting question whether the actual consequences of political secularization have proved them right. But without this Whig theology of spiritual progress after the Fall, the mid-twentieth century Catholic prioritization of religious liberty over coercion would never have been possible.

On Moyn's *Christian Human Rights* (2015)

John Finnis

You can get a more accurate historical understanding both of the tradition of thinking about human rights since about 400 BC, and of the emergence of the Universal Declaration of Human Rights and the European Convention on Human Rights and Freedoms (ECHR), by reading the book *An International Bill of Rights*, written in 1943 by Hersch Lauterpacht, then the Professor of International Law at Cambridge. Lauterpacht had been a student of Hans Kelsen, and was founder of the World Federation of Jewish Students, and his book was written under contract of May 1942 with the American Jewish Committee;[3] the details of this are in the Introduction to a recent edition of it by Philippe Sands QC, who rightly says:

> published in the spring of 1945, [it is] one of the transformative legal works of the twentieth century. It posited a new international legal order, adopting Winston Churchill's commitment to 'the enthronement of the rights of man' and placing the protection of the individual human being at the centre of the international legal landscape, a means to bring an end to 'the omnipotence of the State'. … The book … provided inspiration for the adoption of the Universal Declaration of Human Rights…. on which Lauterpacht had some input… Two years later [in 1950] the European Convention was adopted (one of its principal drafters, David Maxwell-Fyfe, a former UK Attorney-General with whom Lauterpacht worked closely at Nuremberg, noted the 'invaluable aid' that Lauterpacht offered him in the drafting of the instrument).

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[3] As Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010), 202 reports (speaking at that point from the perspective of the 1970s), "the long affirmed position" of the American Jewish Committee was "that 'Jewish rights are human rights'." This may go some way to explaining the strange title of Moyn's 2015 book.

Samuel Moyn's account of this period, in *Christian Human Rights*, resolutely ignores Lauterpacht's 1945 book, and refers to this giant on the postwar international stage only to mention a 1950 book in which, he says, "Lauterpacht offered historical arguments about human rights in the course of his failed advocacy for their role in international law."[4]

In several chapters of his 1945 book, before setting out in its sixth chapter his own fully drafted Bill of Rights,[5] Lauterpacht traces the history of human rights from the

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[4] *Christian Human Rights,* 211 n. 21. In his *Human Rights and the Uses of History* (London & Brooklyn: Verso ["the imprint of New Left Books"], 2014), Moyn says both:

> the lone Anglo-American international lawyer still campaigning for human rights in 1948, Hersch Lauterpacht, … denounced the Universal Declaration as a shameful defeat of the ideals it grandly proclaimed. (p. 77)

and:

> A better way to think about human rights in the 1940s is to come to grips with why **they had no role to play then**, compared with the ideological circumstances **three decades later,** when **they made their true breakthrough**. (p. 79)(emphases added, here and elsewhere)

Moyn thus speaks as if the International Covenant on Civil and Political Rights, substantially drafted by 1954 and adopted in 1966, like its sister covenant on Economic, Social and Cultural Rights, did not exist, and indeed neither is named or it seems alluded to in either of these two books of Moyn's! (However, though only one of them is named, they are, in passing, accorded a couple of sentences and a footnote about the deficient enforcement provisions, in Moyn, *The Last Utopia* at 100, 205, 268.) But they were the always-envisaged second and legally binding part of the project of which the UDHR in 1948 was the preliminary part. For the claim that Lauterpacht "denounced the Universal Declaration as a shameful defeat", Moyn's 2014 book gives no citation; his 2010 book, at 184, says (again without citation) "famously, Lauterpacht denounced the Universal Declaration as dangerous because useless, in the name of agitation [*scil.* by Lauterpacht] for a legally meaningful turn to human rights", adding, two sentences later: "In 1949, in a radio talk [no citation], Lauterpacht criticized the declaration for its nonbinding character and emphasized that the charter [*scil*. of the UN] remained the foundation that alone could authorize any future developments. But it was thin, and he warned fellow international lawyers not to try 'to kindle sparks of legal vitality' in the Universal Declaration." No trace of the alleged famous denunciation can be found in Lauterpacht's 32-page discussion – admirable in its nuance and thoroughness and avoidance of every banality -- of the Declaration and its force, in his "The Universal Declaration of Human Rights", *British Yearbook for International Law* 25 (1948) 354-381, substantially reproduced in his *International Law and Human Rights* (London: Stevens, 1950), a discussion which concludes with the thoughts (375-7; 425-7) (i) that its legal ineffectiveness (which indeed, he insists, should not be denied, softened or evaded) may well stimulate adoption of a binding Covenant, (ii) that the discussions and study preceding the adoption of the Declaration would prove valuable in the making of such a Covenant, and (iii) that pessimistic predictions that the Covenant would await a "distant future" were unwarranted. The 1966 Covenants' degree of enforceability is not all that Lauterpacht desired, and as Moyn, *The Last Utopia* at 268 points out was watered down at the last minute; but it is not negligible.

[5] Lauterpacht's projected Preamble to it reads:

> WHEREAS the enthronement of the rights of man has been proclaimed to be the purpose of the war waged by the United Nations; Whereas the United Nations have declared that they were waging war for the defence of life, liberty, independence, and religious freedom, as well as for the

Greek philosophers and Roman jurists through the medieval philosophical and juristic writers. He understood perfectly well what in later years would be muddled up by Leo Strauss, Michel Villey and the early Richard Tuck (the three writers on whom Samuel Moyn has unfortunately relied[6] for his understanding of the relation between natural law and natural or human rights): that natural law as meant by Plato, Aristotle and Aquinas entails natural, human rights, in the strictest sense of entails: you cannot have one without

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> preservation of human rights and justice; Whereas the United Nations have expressed their desire to establish a peace which will assure to all freedom from fear and want; Whereas the **respect of the natural rights of man to freedom and equality before the law** is the primary and abiding condition of all lawful government; Whereas the denial of these rights is and has proved to be a danger to the peace of the world; Whereas **the natural right of man to freedom comprises the right of self-government** through persons chosen by and accountable to him; Whereas, for that reason, the observance of the principles of democracy must, irrespective of the form of government and of the economic system, be placed under the protection and the guarantee of international society; Whereas **the equality of man regardless of nationality, race, and colour** demands an equal opportunity of self-government and cultural development; Whereas **the dignity of man, the dictates of justice, and the principle of social solidarity** in modern society require that no person shall suffer undeserved want and that the State shall safeguard effectively the right to work under proper conditions of employment, to education, and to social security; Whereas **the sanctity of human personality and its right and duty to develop in freedom to all attainable perfection** must be protected by the universal law of mankind through international enactment, supervision and enforcement; The United Nations of the World now adopt this International Bill of the Rights of Man as part of the fundamental constitution of International Society and of their own States:…

[6] *Christian Natural Rights*, ch. 2 at n. 42:

> nearly all histories of the political language concur that the rise of rights in political theory occurred after and because of the destruction of the Thomistic natural law tradition. [fn For radically contrasting stories on the origins of rights that nevertheless concur on this point, see Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, UK: Cambridge University Press, 1979); and Michel Villey, *Le droit et les droits de l'homme* (Paris: Presses Universitaires de France, 1983).

For my discussions of Strauss and Villey on rights in history, see:

(i) "Grounding Human Rights in Natural Law", American Journal of Jurisprudence 60 (2015) 199-225 at 213-21;

(ii) *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2nd ed, 2013) [hereafter *NLNR*], 205-10, 228, 460, 465-6;

(iii) "Aquinas on *jus* and Hart on Rights: a Response [to Brian Tierney]", Review of Politics 64 (2002) 407-10;

(iv) *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998) [hereafter *Aquinas*], 133-38

(v) "Bentham et le droit naturel classique", Archives de Philosophie de Droit 17 (1972) 423-7.

the other.[7] When the Roman lawyers defined justice in the way that Aquinas (in the preface to his thousand-page treatise on justice) adopted as his philosophical definition of justice – as the willingness to give to or render for another person what he has a right to, that is to give or render to each **his right**, *ius suum*[8] – they were implicitly deploying the idea of **a right** in an authentic and central form. And when Aquinas said that there are duties of justice which are owed to every human person alike, without distinction (*indifferenter*),[9] he was talking about human rights even though he did not use the phrase.

Most but not all claims about the justice or injustice of kinds of act or forbearance are dependent for their truth on the circumstances in which acts of those kinds are done. There are a few, important kinds of act that one has a duty to abstain from whatever the circumstances, at least in the Christian understanding and clarification of natural i.e. fully rational claims about rights and wrongs. None of the rights (of whatever kind) resulting from the countless *other, non*-absolute duties of justice can be identified prior to the assessment of the *competing* rights and interests of the kinds mentioned in provisions such as ECHR art. 9(2):

> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[10]

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[7] The most important point about rights is their logic, which was made fully explicit by Hohfeld but was understood (though not much expounded) by clear-headed thinkers like Thomas Aquinas many centuries earlier: see *NLNR* 199-205; *Aquinas* 134-7. There are four main kinds of right, all either exclusively or centrally concerned with duties. I have a right against you when you have a duty to do something for me or a duty not to do something to me or my property or other interests. I have a liberty right when I do not have a duty to you or others or perhaps anyone else at all either to do something for you or to abstain from doing something for you or to you. I have a power-right, centrally, when by doing or saying something with intent to impose a duty on you or relieve you of a duty I can indeed impose that duty or relieve you of it. And I have an immunity right centrally, when you lack the power to impose on me a duty or to relieve me of it. Duties to other people (such as all the kinds of duty I just mentioned) are duties of justice.

[8] *Summa Theologiae* [hereafter S*T*] II-II q. 57 a. 4 ad 1; q. 58 a. 1; *Aquinas* 133-8.

[9] *ST* II-II q. 122 a. 6; *Aquinas*, 136.

[10] Lauterpacht's equivalent in 1945 reads:

> 16. The enforcement of any law **safeguarding the legal rights of others or providing for the safety and the welfare of the community** shall not be deemed to be inconsistent with the

When the nineteenth-century Popes condemned the idea of a right to religious freedom as madness, they had in mind the idea of, so to speak, an art. 9(1) right[11] without any sub-art. (2). (That is not the only folly they had in mind – the French revolutionary idea of religious freedom also included propositions such as that religious vows are null and void, and associations based on them are contrary to public policy and to be eliminated.)[12] And when the twentieth-century Popes began deploying the language of human rights, which they did – albeit not with great vigour – some years before Jacques Maritain's 1942 conversion to them,[13] and when the Second Vatican Council proclaimed the right to religious freedom from all civil coercion, they were proclaiming the complex right whose content cannot, even in theory, be specified until you take into account the rights and freedoms of others, the protection of public order, health and morals, and so forth.[14]

Prior to that assessment of circumstances there is, properly speaking, *no right, but only an important interest*. It follows that the Universal Declaration and the ECHR are flawed and misleading to the extent that they say that these sub-art. (2)-type

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> guarantee of the fundamental rights proclaimed in Part I of this International Bill of the Rights of Man.

[11] ECHR, art 9(1):

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, [practice and observance.

[12] See Finnis, "Historical Consciousness and Theological Foundations" [1992], in *Collected Essays of John Finnis* vol. V, *Religion and Public Reasons* (Oxford: Oxford University Press, 2011), 139-62 at 158 n. 62.

[13] Thus the *New York Times* for 7 June 1918 reported that the Pope had on 5 June 1918 condemned recent air raids as violating "the rights of man"; broad, principled appeal to the truth of human rights (and their relation to human dignity) can be found in Leo XIII's encyclical *Tametsi futura* of 1 November 1900, which in para. 3 teaches that, as a result of Christ's sacrifice and teaching,

> the *consciousness of human dignity* was revived: men's hearts realised the universal brotherhood: as a consequence, *human rights* and duties were either perfected or even newly created, whilst on all sides were evoked virtues undreamt of in pagan philosophy.

But the Latin original, though attaching *humanae* to *dignitatis*, does not expressly attach it to the "consequent" *officia et iura*; and the final paragraph says that people nowadays hear enough of the "rights of man" and need to hear occasionally of the "rights of God".

[14] On the necessity for specification of rights, see *NLNR* 218-21, 466 (with works of Grégoire Webber and Bradley Miller there cited).

considerations authorize "interferences with the exercise" of the right, implying that the rights in question can be identified in advance of counting those considerations fully.

The drafting is misleading also in demanding that the requirements of public order, public morality and the rights of others be ignored unless they are *necessary* in a(ny) democratic society. This is such a high bar, so unjustly demanding and restrictive, that it has had to be for the most part ignored in favour of a standard less than "strict scrutiny". Since distrust of democratic legislatures is so high among lawyer elites, the standard they impose on legislatures is officially higher than "rational basis", rational relationship to protection of public order or others' rights etc. So we have the intermediate, accordion-like, rather standardless standard of "proportionality", which allows courts extremely wide discretion to replace the decisions of legislatures. Thus the postwar declarations and conventions about human rights have not preserved standards identified and adopted by their authors, Christian, Jewish or practically atheist (like Churchill and Maxwell-Fyfe), but instead have given courts a roving licence to amend the laws and the institutions of civil society without democratic approval but in line with the changing fashions of elite opinion.[15]

As I said 35 years ago at the end of *Natural Law and Natural Rights*'s fairly exhaustive discussion of the logic and history of rights,

> There is, I think, no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing. (219-20)

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[15] For illustrations and discussion of this paragraph's remarks, see Finnis, "Judicial Law-making and the 'Living' Instrumentalisation of the ECHR" in Nicholas Barber, Richard Ekins and Paul Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016) 73-120; "Prisoners' Voting and Judges' Powers" (2015), Oxford Legal Studies Research Paper 58/2015; Notre Dame Law School Legal Studies Paper 1529 http://ssrn.com/abstract=2687247; "Judicial Power: Past, Present and Future" (2016) SSRN:http://ssrn.com/abstract=2710880.

In Samuel Moyn's eye, the Christian-type vision of worthy and sustainable patterns of life is exceptionally repressive and "Christian human rights have been not so much about the inclusion of the other as about policing the borders and boundaries on which threatening enemies loom."[16] (This remark seems to me to speak from the ideological heart of the book, perhaps of the whole 2010-15 trilogy.) For him in his book, as for all of us, talk of rights is mostly a way of *expressing* moral-political judgments – or perhaps, at bottom, a nihilistic amoralism -- the real premises of which are not framed in terms of rights at all. Hence his amazing chapter casting suspicion on the ideas of human *dignity* and *personality* by associating them with the Vichy French regime of 1940-44 and with the 1937 Constitution of the notoriously repressed Irish.[17] Better on all this is, again, Lauterpacht:

> The social nature of man; his physical and mental constitution; his sentiment of justice and moral obligation; his instinct for individual and collective self-preservation; his desire for happiness; his sense of human dignity; his consciousness of man's station and purpose in life—all these are not products of fancy, but objective factors in the realm of existence. As such, they are productive of laws which may be flouted by arbitrariness, ignorance, or force, but which are in conformity with the more enduring reality of reason and the nature of man. This, then, is the law of nature which has acted as the justification of the positive law and as the principal instrument of the legal and political notion of the rights of man.[18]

Samuel Moyn is completely correct to stress that the main changes of ruling elite fashion during the past half-century, whereby "the secular left achieved predominant ownership over human rights"[19] – an ownership in which his book effectively asserts a

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[16] *Christian Human Rights* Introduction (last para); the quoted passage begins: "In the 1940s, as much as in and through some of its contemporary legacies, …"

[17] *Christian Human Rights*, ch. 1.

[18] *International Bill of Rights*, 35.

[19] *Christian Human Rights*, Introduction, text after n. 28.

share – are changes accompanying and in part resulting from what he, like me on occasion,[20] calls the "collapse of Christianity"[21] – by which I for one mean the widespread loss of belief in the propositions of the Christian faith in its historic central form, a loss resulting largely, in my judgment, from the defection of most of the Christian clergy-scholars from belief in the historical truth of the narratives in the Gospels and other New Testament documents. Loss of belief in the *moral* propositions of the Christian faith has *followed* that primary loss not by strict logic but in a very understandable way. In the fairly short-term perspectives (of a few decades) with which Moyn's book is mostly concerned, the fact that the abandoned propositions happen to be true – and the best explanation of all the rationally available data – is having little or no impact on the psycho-social causalities at play, though I think that fact is likely to be of great importance in the longer run. But only in the longer run -- for I think Lorenzo Zucca is simply imagining things when he says there has been a resurrection of Christianity in the 1990s. It remains in steep decline, socially, throughout Europe, a decline which seems to be sharply accelerating and deepening during (and doubtless in good measure because of) the present syncretistic, secularizing and shambolic pontificate.[22]

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[20] "Natural Law" [1996], *Collected Essays of John Finnis* vol. 1 *Reason in Action*, 209:

> VI. *Inviolable Human Rights*. The collapse of Christianity and other religious cultures, as the matrix for contemporary legal and political orders, has posed a challenge tothose who wish to affirm that there is a natural law: to show that, even without the support of a religiously warranted ethic (revealed divine law) having an identical or overlapping content, there are philosophically sound reasons to affirm the truth of non- posited principles or norms which, although not claiming to be authoritative because posited, are sufficiently definite to exclude g ross 'crimes against humanity' (Nuremberg, 1945); chattel slavery; abortions of convenience; non- voluntary euthanasia) and to underpin the main institutions of civilized societies (family, property, religious liberty, and so forth). In particular, the challenge is to show that aggregative conceptions of moral and political reasoning, such as classical or contemporary utilitarianism or consequentialism or 'economic analysis of law', are unsound.

[21] *Christian Human Rights*, last chapter (several times, each limited, however, to "European Christianity").

[22] Ever-increasingly since the 1960s, the human rights project, as Moyn rightly says and regrettably applauds, has become a left-wing and more or less anti-Christian project, and the associated term "dignity" has been effortlessly coopted by the left-wing movements for death by euthanasia and assisting suicide, for increasing deviancy from the hetero-marital normativity which Christianity very reasonably holds is essential to justice for children and the equal dignity of women – not to mention the European left's project of mass immigration by predominantly anti-Christian and anti-Jewish populations. The book's extensive discussion of dignity as if it were an inherently and obnoxiously conservative concept seems to me pretty completely misconceived -- confused from beginning to end by the assumption that *by itself* the concept of

The account given by Samuel Moyn[23] (approved by Lorenzo Zucca) of the Turkish intervention in the drafting of art. 9(2) seems to me largely imaginary; that is, I find in the 26-page official summary (1956) of the drafting of art 9(2),[24] and in the secondary source cited instead by Samuel Moyn, nothing properly describable as a Turkish request that secularism be a principle of art. 9(2), still less anything properly describable as "the Western European states unceremoniously rebuff[ing] the proposal to have Article 9(2) mention religion as a potential threat to the democratic minimum."

Turkey and Sweden proposed identical words simply **to preserve their <u>existing</u> laws**, Sweden's <u>establishing</u> Lutheranism as the state religion and Turkey's described by the Turkish representatives in the following terms: "measures required for security and public order, as well as those restrictions which, for reasons of history, it has been considered necessary, by the States, signatories of this Convention, to place on the exercise of this right" (p.6), or again "legislative measures to prevent attempts being made once again to suppress these freedoms" (p. 5) -- attempts later described by the Turkish representative (p. 14) as the abolition of the "archaic Moslem religious orders", an abolition without which Turkey would never be in a position to join the Convention.

Moyn's and Zucca's comments on allegedly unjust discriminations against that religion fail to address the basic Strasbourg holdings in the *Sahin*[25] (the Turkish university head scarves case, which is equally the basis of the British school jilbab case of *Begum*[26] in the House of Lords) and near simultaneously in *Refah Partisi*[27] (which unlike *Sahin* they do mention). The basis of *Sahin* is protection of girls and women who do **<u>not</u>** wish to wear the religious headdress – protection from the intimidation to which,

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human dignity can settle (and was supposed by those who appealed to it in the 20th century to be able to settle) the question what are the requirements of justice, when in truth it settles *only* that there can be requirements of justice, duties which all human beings are entitled to – that is, have rights correlative to.

[23] *Christian Human Rights*, ch. 4 text before n. 49.

[24] http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH(56)14-EN1338892.pdf

[25] *Sahin v Turkey* (44774/98) (2007) 44 European Human Rights Reports 5 (Judgments of 10 November 2005).

[26] *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 Appeal Cases 100.

[27] *Refah Partisi (No. 2) v Turkey* (2003) 37 European Human Rights Reports 1 (Judgment of February 2001).

in a social context of people mostly subscribing to that religion, they would in too many cases be subjected by religious vigilantes inside or outside their university or home if the headdress were legally permitted. The basis of *Refah Partisi* is stated in words subscribed to by all 21 judges in the Strasbourg Court:

> …the Court considers that sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable*. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it…. a regime based on sharia … clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.[28]

The rest of the paragraph should be read.

The right to be free from intimidatory pressures which is the unmistakable *ratio* of *Sahin*[29] was reasonably seen by the Court in 2001/3 -- and is today seen by widening common-sense sectors of our societies (but not by our ruling, ideologised and wishful-thinking religious and secular elites) -- as the crucial issue of our time and civilizational sphere. For these pressures foreshadow the struggle for eventual total domination of our societies by adherents a religion described in its political aspect by the then government of Turkey in these cases as "show[ing] the characteristics of a totalitarian regime" in its "assert[ing] the right to organize the state and the community", and to achieve this objective by deception and in due course religiously sanctioned and motivated use of force.[30] The motives of the practice of religiously sanctioned deception described to the Court by the then government of Turkey are, I believe, different from the motives of the

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[28] *Refah (No. 2)* at sec. 123 quoting *Refah Partis (No. 1) v Turkey* (2002) 35 European Human Rights Reports 3 (Judgments of July 2001) at sec. 72 (emphasis added).

[29] The factual predicates implicit in the ECtHR's judgments were revealingly overlooked (or ignored) in the elaborate discussion of *Sahin* in Stephen Breyer [Justice of the Supreme Court of the United States], *Active Liberty: Interpreting a Democratic Constitution* (Oxford: Oxford University Press, 2008), 132-41.

[30] For this, and discussion of *Begum*, *Refah*, and *Sahin*, see Finnis, "Endorsing Discrimination between Faiths: A Case of Extreme Speech?" in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy:* (Oxford University Press 2009) 430-441; also (earlier draft) at SSRN: http://ssrn.com/abstract=1101522.

(self-)deception practiced by our current religious and political leaders when they assert that this religion is one "of peace".[31]

The drafting of art. 9(2) ECHR, after contentedly incorporating the Turkish-Swedish suggestion for several stages of the process, eventually dropped it – evidently as *simply unnecessary*. After all, it is obvious that, since art. 9(1) guarantees the right to change one's religion, a right which is incompatible with the religion we are discussing and which is not subject to art. 9(2), the coming of that religion's promoters to power can always legitimately be outlawed. It is equally obvious that art. 9(2)'s permission of laws protecting both public order and the rights of others from manifestations of religious beliefs is sufficient to authorize laws protecting us all from religiously motivated coercion and, indeed, from practices and symbols reasonably regarded as manifesting *and motivating* some degree of intent – on the part of those who *really pay attention* to this religion (of Submission) they profess -- to impose upon some of us[32] now and all of us in due course such a coercively induced civic submission. And indeed to *come in* over our boundaries with a view (among other reasons) to doing so.

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[31] Since *Christian Human Rights* gives some prominence to the Vichy regime, it is permissible to reflect that future historians of the present era may well be inclined to class our dominant political and intellectual leaders as essentially collaborationist, in broadly Vichy mode (though without the imminent physical pressures that Vichy leaders could plead in extenuation).

[32] Characteristically, identifiably Jewish people first. See, e.g. (besides the news from, say, France), Andrew G. Bostom (ed.), *The Legacy of Islamic Antisemitism: From Sacred Texts to Solemn History* (Amherst, New York: Prometheus Books, 2008).

A Comment on Moyn's *Christian Human Rights*, Chapter 4: From Communist to Muslim. Religious Freedom and Christian Legacies

Lorenzo Zucca

I shall begin on a point of deep agreement with Sam Moyn and deep disagreement with John Finnis: Headscarf cases show the limits of secularism in France, as well as the limits of art.9 jurisprudence in Strasbourg. Moyn and I agree that Christian symbols and practices receives a better treatment than Muslim symbols and practices.[33] Indeed, the Hijab legal controversy and the Burqua legislation are the expression of base populism and bias against Muslims. France's legislation banning conspicuous religious symbols targets Muslims (and Jews), but does not affect Christians.[34] It was presented as neutral, but indirectly discriminated between religious people.

Professor Finnis argues instead that there is no unjust discrimination against people of Muslim religion. He uses as evidence of his claim two cases originating from Turkey: *Leyla Sahin* and *Refah Partisi*. Finnis would like us to believe that the rise of political Islam in Turkey, and in Europe, is an inherent and inescapable fact of Islam as a religion of domination. According to Finnis, the "right to be free from intimidatory pressures [...] is the unmistakable *ratio* of *Sahin.*"[35] Finnis also argues that the decision in *Refah Partisi* affirms the rightful resistance to total domination by Islam.

I do not believe that Islam is more coercive or more bent on domination than any other religion. I believe instead that *any* political use of religion is potentially dangerous, manipulative and delusional. Moreover, I also believe that *Refah Partisi* was a very dangerous decision as it relied on an ideological fear of Islam, rather than on factual

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[33] See Moyn's conclusion, Chapter 4.

[34] Elsewhere, I argued that French laicite has become discriminatory rather than inclusive.

[35] The factual predicates implicit in the ECtHR's judgments were revealingly overlooked (or ignored) in the elaborate discussion of *Sahin* in Stephen Breyer [Justice of the Supreme Court of the United States], *Active Liberty: Interpreting a Democratic Constitution* (Oxford: Oxford University Press, 2008), 132-41.

evidence of the risks correlated with *Refah Partisi*. It is not that I do not see the risks; rather I am complaining that the decision sanctioned *Refah Partisi* for its beliefs rather than for its actions (and this is incompatible with freedom of belief). More generally, the fact that Turkey slid towards religiously inspired totalitarianism does not take away from the fact that France slid towards unjust discrimination against religious minorities.

We have to be clear on where the disagreement lies. It is clear to me that Turkey has failed to promote secular institutions capable of secularising the society. Ataturk's secular Republican project inspired by France has backfired. Not only the Turkish society has preserved high degrees of religiosity, but its secular elite has been swiped away and replaced with a totalitarian government inspired by religious principles. This is an illustration of the failure of a secular project, which has opened the way for a demagogic party that uses religion for political gain; for John Finnis, it is the natural affirmation of Islam as a religion that is engaged in political deception and religiously inspired use of violence. Finnis does not provide evidence for his sweeping claim about Islam; I do not find his claim persuasive or intellectually compelling, to say the least.

1. FREEDOM OF RELIGION IN EUROPE

I move onto the disagreement with Moyn's understanding of freedom of religion. Moyn argues --rather sweepingly-- that freedom of religion is there to marginalize and postpone the rise of secularism. The problem with this argument is that it is too quick and rides roughshod over important historical moments of discontinuity during which freedom of religion and political secularism were used as weapons of the same arsenal. The history of freedom of religion in Strasbourg can be divided into two chapters. The first chapter sees a moderate embrace of political secularism through the doctrines of neutrality and pluralism; the second chapter sees the surprising rise of a Christian transatlantic alliance and a corresponding demise of political secularism. Moyn's account is not complete as it leaves out the first chapter of the story; it also misleadingly presents the rise of Christian lobbies in Strasbourg as a resurrection of Christian Human Rights. I am going to suggest instead that Christian lobbies in Strasbourg are merely brought together by a political calculation.

In 2016, we celebrated the 50th anniversary of the right to individual petition at the ECtHR (1966). This was an immediate success and the caseload of the court increased exponentially since then, so much so that the last 20 years have been occupied with problems of caseload management. Now, what is interesting is that art.9's first case only dates of 1993. Moyn's account does not provide a clear explanation of why freedom of religion came to prominence only then. If we were to follow Moyn—the explanation is to be found in the collapse of Christianity in the 60's. But then, what does explain the sudden emergence of Freedom of Religion in 1993? Professor Finnis interpreted this statement as my affirmation of the resurrection of Christianity. I am not suggesting that, and I am very happy to report that I agree with him that Christianity as a whole is waning from European societies; though I am not so happy to report that there is at the same time a rise of political Christianity: freedom of religion in Strasbourg is litigated strategically by Christian actors and it is used instrumentally to protect vested Christian interests.

I am also questioning Moyn's explanation of the re-emergence of 'Christian Human Rights.' We all agree that Christianity has collapsed after WW2; given that premise, what would explain the return of Christian Human Rights? I could not find a clear explanation in Moyn's book. My (quick) alternative account is the following: with the collapse of the Soviet Union also collapses the corpse of Christian Democracy that was kept alive artificially in order to contrast communism. In 1989 both collectivism **and** Christian personalism collapse; contrary to what Moyn believes, personalism at this point receives a great, deadly, blow. For someone who grew up in Italy in those years, it marked the end of 50 years of Christian Democracy and the dismantlement of the Christian Democratic Party invested by one of the biggest corruption's scandals in the history of the country. 1992 is a turning point, a mere three years after the fall of the wall. It is the beginning of the second Republic in Italy. The collapse of Christian Democracy left the door open for the emergence of political liberalism.

In 1993, art.9 ECHR begins to be used as a Trojan horse of political liberalism and moderate secularism. A line of cases from Kokkinakis (1993) to Hasan Chaush (2000) show a court intent on dismantling establishment and concerned with the lack of neutrality in a space that cries out to become more religiously plural.

2. ART.9's STORY: Missing a chapter?

Moyn's story of art.9 is missing a chapter: the development of art.9 litigation from 1993 to 9/11. In the first years of application of art.9, freedom of religion is used to bring more separation between Church and State. *Kokkinakis* (1993)[36] is a case about Greece's Constitution that singles out the Greek Orthodox Church as an established Church. As a consequence of that, all other minorities are severely constrained. In this case, a Jeohva's witness was complaining of his imprisonment following his proselytizing activity. *Hasan Chaush* (2000)[37] is another example of the ECtHR punishing the Bulgarian state for having intervened in the religious business of local communities; in this decision, the Grand Chamber introduces the principle of neutrality of the state. We can add to this story the case of the *Church of Bessarabia* (2001).[38] During this period, the target is the less well-known Christian Orthodox religion; and the point is to nudge states towards separation between state and church. The first chapter of art.9's litigation in Strasbourg spans from 1993 to 2001 and could be called 'the emergence of political liberalism.'

The story changes after 9/11- and it is important to stress this factor as a source of **discontinuity**. Moyn would like to argue instead that even before 9/11 the ECHR shows the existence of a double standard if we compare the Rushdie case with other Christian blasphemy cases. But the Rushdie case is an isolated and very peculiar case that symbolised the centrality of free of speech, rather than the double standard of freedom of religion. I believe that a new chapter begins with 9/11: highly unlikely Christian alliances are formed, as a reply to the alleged threat of Islamic terrorism, and for geopolitical reasons.[39] The project of international freedom of religion as a transatlantic Christian alliance becomes concrete with George Bush's administration that sets up a number of

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[36] *Kokkinakis v. Greece*, [1993] ECHR 20 (25 May 1993).

[37] *Hasan and Chaush v Bulgaria*, [2000] ECHR 569 (26 Oct 2000).

[38] *Metropolitan Church of Bessarabia and Others v Moldova*, [2001] ECHR13 (December 2001).

[39] Pasquale Annicchino, 'A Transatlantic Partnership for International Religious Freedom? The United States, Europe, and the Challenge of Religious Persecution,' Ox. J Law Religion (2016) 5 (2): 280-297.

institutions exclusively dedicated to international religious freedom.[40] Those institutions are influencing foreign policy, and are dominated by a political outlook, that attempts to impose civilizational lines of conflict between an alleged Christian West and Islam.[41] All these policies are the fruit of a neo-conservative coalition that can hardly be associated with a Christian personalist ethics.

A neo-conservative outlook is prepared to sacrifice political secularism in the name of a more identitarian politics around the world. This is the second chapter of art. 9's litigation; its most representative decision is *Lautsi v Italy* (2011), where a transnational Christian alliance lobbies the court to decide in favour of the preservation of the crucifix in Italian state classrooms as a legitimate symbol of cultural and political identity. Interestingly, the decision of the lower chamber of the ECtHR expressed a strong secularist position (2009). But at the Grand Chamber level, the intervention of a truly transatlantic Christian alliance between the Catholic Church, the Russian Orthodox Church and American Ecumenical Protestants appears. Here we can see the final point of departure from political secularism, however understood, and the victory of a Christian political alliance (however unlikely). Islam helped to resurrect a Christian conservative alliance, capable of successful lobbying in Strasbourg. An important distinction has to be introduced at this point: to say that a Christian conservative alliance is formed to lobby the Strasbourg Court, does not mean that the ethos of Christian Human Rights re-emerges victorious. There is a huge difference between a lobby with a political agenda, and a principled movement with a strong personalist ethics.

Moyn faces at this point a genuine problem for his account: does a Transatlantic Christian Alliance have anything to do with 1940's Christian Human Rights? Moyn seems to suggest that there is a continuity, albeit paradoxical, between the Christian personalist argument in favour of human rights and the more recent transatlantic Christian alliance. To claim that, one would have to prove that what lies behind Christian Human Rights—

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[40] Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion,* Princeton University Press, 2015.

[41] The clash of civilizations has been inspired by the homonymous work of Samuel Huntington, *The Clash of Civilizations,* Simon & Schuster UK; Reissue edition (5 Jun. 2002).

namely personalism—has a principled influence on the interpretation and politics of human rights. Moyn does not provide such explanation. It seems to me that the Christian alliance that was brought together to litigate *Lautsi* is more of an instrumental one, rather than a principled one. And here lies the deepest challenge for Moyn: how does he reconcile his principled understanding of Christian Human Rights in personalist garb, with the fact that religions use human rights in geopolitical ways –that is to say, highly instrumental ways?

3. Is Islam Heir of Communism?

Moyn claims nonetheless that the headscarf saga represents a reincarnation of Cristian Human Rights: Strasbourg uses human rights not so much as a product of secularism, but as a by-product of the Christian struggle against secularist communism in the first instance, and against Islam as a reiteration of the same theme.

I find this hard to buy because of the context in which the headscarf cases emerge;[42] the point of those debates is the defence of a hard-core French laique position. When it comes to Turkey, the case is even clearer. The battle is between 'laikly'—the Turkish concept of secularism borrowed from French laicite—and the rise of political Islam.[43] In both cases, Strasbourg lent a helping hand to strong forms of secularism, and not to propound a Christian outlook on Human Rights.

Does it make sense to claim that Muslims have inherited the place occupied by Communists? My short answer is that it only makes sense in a superficial sense: political Islam has supplanted communism as the main political problem of the liberal West.

Moyn's account relies heavily on *Refah Partisi*'s case to make this point. The ECHR – Moyn claims— uses the doctrine of Democratic Minimum, first elaborated by the Strasbourg's court in the context of protection of Democracy against the threat of

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[42] For an in depth account of the hijab debate in France see Cecile Laborde, *Critical Republicanism. The Hijab debate and political theory,* OUP 2009.

[43] This is beautifully illustrated in Ohran Pamuk's Novel *Snow,* London, Vintage, 2005.

Communism.[44] While it is true that that is the origin of the doctrine, this does not entail that the court is using it to eradicate a comparable threat. The causal link is too weak for three reasons:

a. *Refah Partisi* did not pose the same threat as communist parties. The memory of Communist rule was still fresh in Eastern Europe and Communist parties still represented a huge, credible threat in virtue of the communist experience. Refah Partisi did not emerge from a previously existing experience.

b. The Communist threat was external and political, while the Islamic threat for Europe is chiefly internal and psychological, and concerns Europe's ability to promote secular citizenship and secular values.

c. Communism never challenged European political secularism; it was just a more extreme form of it. Political Islam is a direct, internal, challenge to European political secularism: it contradicts its key doctrines, highlights its biases and shows its weakness in propounding a fully-fledged worldview alternative to religion.

So if it is true that political Islam and Communism are both treated as potential threats to European democracies by Strasbourg, the parallel stops there. Communism offered a concrete alternative to liberal capitalism (and political liberalism). Political Islam is not a credible alternative to anything; where political Islam has some success is when it holds up a mirror, which Europe is scared to look into: laicite and secularism, as presently understood, do not provide a viable worldview or a political option that inspires love of the country and deep political emotions.

Moyn and I agree on the prognosis, but not on the diagnosis. I do not find in Strasbourg any evidence of the resurrection of a Christian personalist ethics. I see a court that tries to avoid a sea of troubles rather than facing the hard question of how to reconcile secularism with an aggressive use of freedom of religion. I do not expect Strasbourg to provide an answer to that. It is the job of intellectual leaders to rethink the core problems of our

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[44] For a leading case in point, see *United Communist Party of Turkey v Turkey,* 30th January 1998. Turkey's political parties have been the object of several cases in Strasbourg.

times so as to open new paths of coexistence. And today, more than ever, intellectuals have to rethink secularism in a way that provides a platform for a life in common between religious and non-religious people. As for Christian Human Rights, they have no future as a coherent intellectual position, but we may still see awkward Christian political alliances in the courtroom. Historians, philosophers and lawyers have to strive to provide an accurate and compelling account of freedom of religion and human rights. These require us all to refrain from making sweeping generalisations about human rights on one hand, and Islam on the other. Finally, it is high time for all intellectual leaders to start rethinking secularism as a positive worldview towards diversity rather than as a negative statement against religion.[45]

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[45] I develop this position in *A Secular Europe. Law and Religion in the European Constitutional Landscape,* OUP, 2012.

Tradition and Beyond: *Christian Human Rights* in Debate

Samuel Moyn

It is a great honour to have *Christian Human Rights* read and criticised by these three premier scholars, and I am grateful to them for giving my book their attention. Since I am in sympathy with so many of their remarks, I will focus in my brief response mainly on their more serious reservations.

John Finnis and Thomas Pink give accounts that are based on a fundamentally internal perspective — from within Christian tradition and thought — where my point of view is secular and external. While external perspectives on traditions can risk insufficient empathy and glaring ignorance, internal vantage points court their own difficulties, and tend almost inevitably in the direction of apologetics in the original sense of that term. Worse, they routinely mistake what have been generated as internal rationales for changes after the fact for actual causes of and reasons for externally driven transformations. I do not disagree and indeed would insist that no tradition changes if its partisans do not offer justifications of revision that make sense to them from an internal point of view. And traditions are defined as much by such change as by stasis, always argued out from within, and with enduring internal principles justifying departures. But it is another matter to credit such internal sources as the causes of and reasons for the change in the first place. Most frequently, they are more like rationalizations. To external observers, this fact is generally very plain.

In his fair-minded response to *Christian Human Rights*, Pink reasonably says that, in the otherwise shocking commitment of Catholic authorities and philosophers to universal personal entitlements at the middle of the twentieth century, there must have been some antecedents. And of course that is the case: *ex nihilo nihil fit*. Further, even for believeable pretexts to be found for "opportunistic" change within a tradition, there has to be *some* basis on which to claim the novelty is possible to reconcile with what came before, and Pink surveys some of the traditional sources, both in medieval philosophy and modern papal teaching, that made it allowable to integrate human rights. Similarly, it was clearly possible from the start for the phrase "all men are created equal" in my

country's Declaration of Independence to be later understood to include black men. This does not, however, mean that the commitment caused its own eventual clarification: it took a war for that result to obtain. *Mutatis mutandis*, whether one can say more than that deeper Christian sources made the integration of human rights protections for individuals possible — especially given their rather subjectivist and libertarian modern forms — is very far from obvious. If available implications even of core premises are not drawn within a faith tradition for millennia, with other theological possibilities and lived realities explored first along the way, it seems sensible to conclude that their sudden prominence is owing to external shocks to the system. What the Civil War was to my country, World War II was to Roman Catholic thought.

I do concur with Pink, of course, that Christianity has not been politically conservative in all of its versions, even once the very notion of conservatism made sense in modern times. And I am prepared to believe him that Dignitatis Humanae partakes of a much more optimistic theology than many other versions of Christian doctrine. Pink's proposal about the underlying radical shift in assumptions about the relation of church and state as the fundamental one for explaining the endorsement of religious liberty strikes me as very interesting and plausible – though then one has to ask why *that* shift occurred when it did. In any case, I focus little on Vatican II in the book, compared to rhetorical changes before, and am certainly willing to concur that more is needed than allusion to anticommunism to explain its outcomes. But if my emphasis helps right the usual imbalance between external and internal forces, I suppose, it is still worthwhile.

I myself think that external factors are routinely underrated, especially because the adherents of a tradition do justifiably claim internal authority over interpretation of what they choose to believe in the tradition's name. Consider another parallel, much closer to the topic of religious liberty on which Pink focuses. In a kindred book to mine, historian John Connelly offers in masterful contextualization of pre-Holocaust Catholic racism, canvassing all of the external reasons that had driven so many Roman Catholic prelates and philosophers into anti-Semitism, including racially justified anti-semitism, and showing how Catholic theologians found internal reasons from their tradition to endorse it fulsomely. And yet when he comes to Vatican II, Connelly focuses on a new spiritual climate and a novel reading of Paul's Epistle to the Romans that, he says,

mandated rethinking of old positions.[46] But why cut off the contextualization when it explains bad things and not better ones? Such internal rationales certainly were the ones offered for the rather drastic alteration in Roman Catholic views concerning the Jewish people, but only more exploration of external factors — just as Connelly conducted for prior racism — can verify whether they were causal or not, and (if they were) how much so. In the face of any phenomenon, it is always legitimate to ask: why did it happen then and there and not before or after or elsewhere? That traditions like the Roman Catholic have had such a long clock to run make its peregrinations far more a matter of adaptation to climate than inevitable working out of original truth. In Connelly's case, for example, it is reasonable to wonder what made a new reading of Romans possible and plausible when it came. The letter was old, and it was reinterpreted under pressure. And it was not in a political void but instead when the West now pitted "Judeo-Christianity" against secular evil. I think something similar applies when it comes to the sudden pivot to human rights and religious freedom.

In any event, it would certainly not make sense to suggest that human rights, or religious freedom in particular, were in any way conceptually unthinkable or unjustifiable within Catholic premises. Clearly, both were floridly embraced, and anything that becomes actual was always possible. Instead, my historical argument concerns the political circumstances in which the possibility was actualized, with universal human rights becoming much more mainstream and applied in surprising ways. In summary, Pink is ultimately on the firmest of grounds in supposing that old sources are required for new implications; but precisely insofar as the former were "crucially indeterminate" (as he himself describes them), then it is the circumstances in which their determinacy is resolved in the direction of the latter that may count most – and that resolution is not just a matter of the tradition working itself out.

For John Finnis, the tradition has been working itself out for a rather long time. In his view, it reformulated itself in terms as human rights, albeit with the bittersweet result

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[46] John Connelly, *From Enemy to Brother: The Revolution in Catholic Teaching on the Jews, 1933-1965* (Cambridge, Mass.: Harvard University Press, 2012).

that implacable adversaries soon got the upper hand. I admit I enjoyed Finnis's commentary. It is of course a tremendous honour for a lowly historian such as myself to receive the views of a deservedly renowned philosopher and legal theorist, even if his views are very critical. In his acidulous but fascinating essay, Finnis combines a number of rather minute rejoinders to my books — a couple plausible — with apocalyptic *Kulturkritik* morbidly decrying catastrophe now that a conspiracy of serious foes like secular leftists and Muslim immigrants threaten Christendom with climactic doom. Generously noting dangers for Jews in particular as that dusk falls today, Finnis also lionizes Jewish lawyer Hersch Lauterpacht for recognizing classical and Christian origins in the human rights he hoped to internationalize. (Finnis adds — though it is hardly clear that Lauterpacht would agree — that human rights have since been perverted by judges illegitimately bringing social life into line with their fashionable elite multiculturalism and relativism.) Finnis takes strong exception to my finding that the proposed Vichy constitution was the first to elevate human dignity to first principle, though it is nothing less (or more) than a fact. But he helps himself to the (farfetched?) speculation that it is today's progressives who may look like Vichyite collaborators if anyone remains around to grasp their rank betrayals. All told, Finnis is not afraid to state clearly where he thinks his traditional perspective leads, even if the results look like alarmism, not to mention Islamophobia, to others.

For myself, I simply worry that it is bad history. Instead of framing at least relatively restricted claims about traditional continuity, as Pink does, Finnis is insistent that a Platonic-Aristotelian (and later properly Christianized) theory of the human good is all or the main part of what anyone could and should plausibly mean by a theory of human rights.[47] I do agree that there is a case to be made for the classical and or at least the medieval origins of the very abstract and preliminary commitment to what became

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[47] This peculiar claim has not been without influence on recent commentators with no apparent apologetic brief for traditional Christianity, such as John Tasioulas, whom I thank for organizing the event at King's College on which this forum is based. See Tasioulas, "Towards a Philosophy of Human Rights," *Current Legal Problems* 65, no. 1 (2012): 1-30, and my "Human Rights in Heaven," in Adam Etinson, ed., *Human Rights: Moral or Political* (New York: Oxford University Press, forthcoming).

modern human rights — an origin that the most familiar Roman Catholic narrative of high medieval apex and calamitous moral declension is more to blame for obscuring than Richard Tuck or myself are. More important, even if Finnis is correct about the medieval history, it is not really material to anything I have been intent to claim about later developments. Finnis may not believe — or forgive — me on this score, but in spite of his very fair allusion to my citation of figures like Leo Strauss and Michel Villey (along with Tuck) to indicate the essential modernity of human rights, nothing in either my original history *The Last Utopia* nor in *Christian Human Rights* itself actually depends on their accounts. In fact, in the bibliographical essay to the former book, I survey the various options for the origins of the very idea of rights – including medieval origins – while adding that I need not choose among them to motivate my attempt to track a much later political project around international human rights.[48] In the latter book, similarly, no strong denial of the possible deep origins of the very notion of a human right is required — though most authorities still disagree with Finnis's interpretation of medieval thought on this point – in order to stress the emancipatory redefinition of that notion with later secular modernity, creating the *status quo ante* for the conservative developments the book traces across the 1930s and 1940s.

Further, even to the extent his own narrative is viable, Finnis's case for deep continuity is very selective, not really extending to *what contents* natural rights were given in tradition nor especially to *what political projects* were eventually sponsored in their name — omitting the liberatory ones that by the seventeenth and above all later centuries would have made St. Thomas Aquinas blanch. Finnis passes silently over whatever does not seem to fit a tale in which Christians following classical sources invented modern human rights until miscreants carried out a hostile takeover. Never mind, apparently, that Plato and Aristotle, as well as generations of Christians before their religion mysteriously began to self-destruct and produce modernity, willingly imposed

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[48] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010), 212-13. See also the exchanges with Dan Edelstein and others in the forum in *The Immanent Frame* around *Christian Human Rights* for more on this important topic: http://blogs.ssrc.org/tif/christian-human-rights/.

almost unbelievably repressive "patterns of life" (in Finnis's phrase) that few had an opportunity to shirk. Never mind, further, that the modern Roman Catholic Church declared war on the Enlightenment and the French Revolution, and perhaps for good reasons that far transcended the increasingly latitudinarian interpretation of religious freedom it saw rising.[49] Never mind, finally, that so many European Christians turned their back on liberalism, democracy, and inclusion when it counted most in the last century (and when, since he himself raises their vulnerability as a pivotal concern, Jews faced their most mortal threat). I do not at all mean to denigrate or trivialize the accomplishments of Christians or Christianity, as the epilogue to my new book proves; but I simply do not think it is possible to construct a prehistory of contemporary human rights without mentioning that, at the very least, Christian politics in theory and practice required a massive self-correction to incorporate their protections. There is no hint of such self-critical perspective in Finnis's commentary, the ire of which is entirely directed outward. In his essay, it appears to be all just a matter of Plato and Thomas Aquinas propounding the truth and a conspiracy of secularists and Muslims balefully scuttling it.

Finnis rallies to the Universal Declaration of Human Rights and a couple of treaties before he sees curtain begin to fall, enlisting Lauterpacht in his subordination of human rights to the Platonic-Christian common good. But perhaps it is most revealing that Finnis cannot keep himself from criticizing these lax and libertarian texts that he says already failed (in their approach to limitations) properly to confine the scope of rights through a reflection on and participation in the larger enterprise of the common good. These criticisms, however philosophically appropriate, are also a sign that Finnis is a *product* of the story my book tells, in which the tradition was updated to accommodate a modicum of personal entitlements precisely on condition of their conservative restriction; and it is suggestive that even after retrojecting the outcome of that that mid-twentieth century evolution in neo-Thomism back into the Middle Ages and before, Finnis cannot bring himself to fully celebrate human rights law — in view of its risky and irresponsible original formulations, not simply what he regards as its unfortunate later abuse.

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[49] But compare recently Ulrich Lehner, *The Catholic Enlightenment: The Forgotten History of a Global Movement* (New York, 2016).

As I wrote in *Christian Human Rights,* when Roman Catholic popes and publicists suddenly claimed they had always believed in human rights, especially as World War II wound down and the winning side was clearer, it was always with an explicit reservation that sought to immunize those newfound or rediscovered principles against their now fearful emancipatory and individualist potentialities. Finnis's own brilliant philosophical career strikes me as unimaginable apart from these events: it has hardly been a linear outcome of medieval Christian thought. Compare his conclusions with the thinking of neo-Thomists before World War II, or indeed full-scale reactionaries in his own church today who still view human rights as dissolute immorality dressed up as high principle but destructive of natural law, and Finnis starts to resemble an unhinged Jacobin in his willingness to incorporate individual entitlements to any extent. For such reasons, I see nothing to alter in my original claim in the book that "[m]any of those who want the ideological association of Christianity and human rights to be deep and lasting are participants in such inventions [of tradition] rather than analysts of them" — except that I might have included Finnis in my verdict.[50]

And yet in the end, and much more important, though I part ways with his dating and politics, I actually think Finnis is profoundly correct about the need to achieve a richer approach to social morality than contemporary human rights law and movements frequently allow, so as to secure a more well-rounded emphasis on those "patterns of life" he rightly prizes because they are "worthy and sustainable." Where I differ from him is simply in failing to understand why he thinks medieval and modern Christianity provided those patterns, as if it had not been much more a rationale for the unjustifiable rule of some over others, as all historical religions have chiefly been — including Christianity and Judaism, and not simply Islam, since the former have generally demanded as much "submission" as the latter.

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[50] Moyn, *Christian Human Rights*, 5-6. See also my review of kindred Oxford (though secularist) conservative Larry Siedentop's medievalism, which like most such exercises drastically understates the moral significance of modernity, to the point that its values have to be projected backward for medievalist nostalgia to be even presentable: Samuel Moyn, "Did Christianity Create Liberalism?," *Boston Review* 40, no. 1 (January-February 2015): 50-55.

Finnis's commentary breaks down, in the end, in simultaneously identifying me as a cheerful enthusiast for the leftist capture of human rights and a pitiless critic of the same precepts. In truth, I am neither the one nor the other. An emancipatory ethic for individuals (and therefore human rights), which I favour, would have to be also egalitarian and solidaristic among individuals (while human rights, with their huge contemporary prestige, have only provided one element of a plausible defence of the human and collective good). I do agree with Finnis that modernity has been excessively libertarian, but not because it has been insufficiently Christian.[51] In the end, however, we are not going to get a proper appreciation of what was and is both progressive and problematic about modern emancipation — and therefore improve and perfect it — by pining for lost medieval syntheses of reason and faith or fearing endless waves of totalitarian enemies.

Many of Finnis's specific remarks are well taken. While in seeking substantiation for my assertions about Lauterpacht in one of my books, Finnis may have misunderstood that he needed to look to the end of my paragraphs where at my publisher's behest I put all references, his scepticism about my claims concerning the meaning of Turkish proposals for the form of European Convention of Human Rights Article 9 strikes me as better founded. I do not mean to stretch beyond my evidence (I have read and do cite, however, the *Travaux préparatoires* of the treaty in the book). And the fact remains that Turkey proposed to make Article 9(2) concerning limitations more explicit and determinate about the possibility of religious threats to democracy, a proposal that did not survive the drafting in an age of greater Christian ambiance.

Lorenzo Zucca's much more conciliatory expert commentary strikes me as helpful and persuasive nearly all the way along. He accurately reports that I did not provide — but then I did not purport to provide — full coverage of the religious freedom cases of the European Court of Human Rights, or even of its cases concerning Muslim practices. I did not believe I needed a general account of the obscure prehistory of Article

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[51] See recently Samuel Moyn, "Rights vs. Duties: Reclaiming Civic Balance," *Boston Review* 41, no. 3 (May/June 2016): 42-47.

9's interpretation before 2001 (though I mention it briefly), because the truth is that the European Court remained a very obscure institution for a long time, catapulting to true significance in European affairs with the end of the Cold War and especially with its Protocol 11 that allowed individual petitions and caused the caseload to skyrocket. In other words, the fundamental reason the specific jurisprudence on religious freedom at the court got a late start is that the court itself did. But Zucca plausibly says it is interesting to begin the story with *Kokkinakis v. Greece* (1993) and its early sequelae, which create a different pattern than more recent judgments.

Fortunately, I do not assert in the book that those cases involving Muslim practices involve the uptake of Christian personalism either by direct inheritance or belated retrieval. In fact I think the main causes of the outcomes are probably not to be sought in the realm of ideology at all — except for a juristocratic one that has championed the beneficent authority of judges in recent decades, offset only by an understandable fear of backlash in prominent cases. I have little doubt that, in *Lautsi v. Italy*, the initial Chamber decision deeming crucifixes in public classrooms in violation of religious freedom might have stood had the case not been tried in the media before the Grand Chamber took the chance to reverse the original holding under pressure. The fragility of the institutional legitimacy of a still fledgling court in the face of an incensed public strikes me as the most persuasive factor in determining the outcome than any legal doctrine or political ideology, whether short- or long-term. Meanwhile, in the same public sphere to whose ambient norms judges normally conform (as Finnis correctly notes) there was broad sentiment for and not enough against the outrageously discriminatory treatment of Muslims so manifest, Zucca and I concur, in the headscarf and related cases.

All that I minimally claim in the one chapter of *Christian Human Rights* that Zucca takes up in his essay is that the doctrinal basis of and template for the decisions were introduced to deal with the problem of secular communists in Christian Europe, before they were applied in radically different circumstances to religious Muslims in secular Europe. I developed this argument, in large part, to push back against American scholars who have not seen all that much difference between Christianity and secularism, except that the one is overt and the other covert. In my argument, I intended to reply that,

if this is correct, Christianity — including Christianity directed against secularism — remained overt in the uses of religious freedom from its beginnings (the rare secularist like Benedict Spinoza aside) until very recently.

But when it comes to the recent cases, I agree with Zucca that my suggestion is "superficial" — a claim about legacies that is in no way a full or even predominant explanation for case outcomes. It is certainly true that secularism, not Christianity, is what the recent cases on Muslim attire defend (though not simply in France and Turkey but at a supposedly neutral European level the very purpose of which is to assess compliance with a treaty protecting individual rights). The role of a disturbing coalition of promoters of political Christianity, as I cite Pasquale Annicchino arguing and as Zucca also powerfully describes, is certainly noteworthy too. (Finnis is surely correct that the episodic role of a powerful Christian lobby does not necessarily mean that there has been a broader Christian renaissance.) And I fully concur with Zucca that individual Muslims do not present a "threat" to democracy remotely in the same league as communist parties were once viewed as doing. As I write in the book, even if one considered it plausible for a human rights court to approve the banning of the latter, it is the height of paranoia for it to sign off on interference with religious practices of the former.[52] Only taking Finnis's view, on slim evidence, that Muslims are engaged in a concerted effort to create "Eurabia" on Christianity's old continent could lead to that conclusion. Finally, Zucca convincingly argues that the judges of the European Court of Human Rights are hardly so caught up in a Christian past that they cannot change their minds (though the steep price in institutional legitimacy they might have to incur is still considerable).

Something extraordinary has happened the Christian faith of Western Europeans, for good or ill. Whether my commentators are coy, critical, or celebratory about these developments, all agree that human rights have largely outlived their Christian phase — even if without the influence of Christianity at a specific juncture in its recent history, people might have had to find something else to believe in. And whether in terms of human rights or something else, just as Zucca observes, intellectual leadership is critical

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[52] Moyn, *Christian Human Rights*, 163.

to seek coexistence of old and new Europeans for the sake of Europe's very different future. That coexistence will need to be neither Christian nor Muslim in basis but secular. And of course, its achievement will require far more than judicial self-correction. But it is not unthinkable. After all, traditions do change.